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513389—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 709

VIRGINIA ELECTRIC AND POWER COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions of the court below (S. R. 62–78) [1] are not yet reported. The findings of fact, con-

[1] Throughout this memorandum the same method of referring to the record as used by the Company in its petition is followed: "R" refers to the printed transcript of record heretofore filed in this Court, when this case was previously before the Court, October Term, 1941, Nos. 25 and 26; "S. R." refers to the transcript of record filed in this Court containing the principal proceedings had subsequent to the filing of the transcript of record in this Court in the earlier proceeding.

clusions of law, and order of the Board (S. R. 13–62) are reported in 44 N. L. R. B. 404.

JURISDICTION

The decree of the court below was entered on December 9, 1942 (S. R. 78–79). The petition for a writ of certiorari was filed on February 4, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. The Board found that the petitioner dominated, interfered with and supported a labor organization of its employees, entered into an agreement with that organization providing for a closed-shop and check-off of dues for the purpose of securing that organization's financial stability, and coerced its employees to authorize the check-off by making it a condition to retaining their jobs, thereby committing unfair labor practices in violation of Section 8 (1) and (2) of the Act. The question is whether in these circumstances the Board properly required the petitioner to reimburse its employees for the sums of money which the petitioner deducted from their wages and paid over to the dominated labor organization as their dues.

2. Whether there is substantial evidence to support the Board's findings of fact that petitioner dominated, interfered with and supported a labor organization of its employees. This question is presented only to the extent, if any, that may be pertinent to examination of the first question.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

On February 27, 1940, the Board, after the usual proceedings, issued an order against the Virginia Electric and Power Company, herein called the Company (R. 952–980). Upon petitions by the Company and by the Independent Organization of Employees of the Virginia Electric and Power Company, herein called the I. O. E., to review and set aside the Board's order, the court below, in an opinion (115 F. (2d) 414) issued on November 12, 1940, set aside and refused to enforce the order (R. 1005–1019). Thereafter, this Court granted writs of certiorari and in an opinion (314 U. S. 469) issued on December 22, 1941, reversed the decision of the court below and directed that the cause be remanded to the Board for a redetermination of the issues in accordance with the opinion of this Court (S. R. 1–10). Upon the remand of the case, the Board

reconsidered the entire case upon the original record and on September 24, 1942, issued a new decision (44 N. L. R. B. 404) containing its findings of fact, conclusions of law, and order (S. R. 13–62).

In substance the Board found that the Company had engaged in espionage through the use of a full-time undercover operative furnished by the Railway Audit and Inspection Company (S. R. 23, 36; R. 56–59, 198–201, 331–333, 370, 399–400);[2] interrogated employees to discover their union activities (S. R. 23–25, 36; R. 63–64, 83–84, 93, 400, 403–404, 820–821); discharged an employee because he advocated affiliation with an "outside" union (S. R. 49–50; R. 115, 128, 140–141, 143–144, 379, 381, 394, 397–398, 409); dominated and interfered with the formation and administration of and contributed support to the I. O. E. (S. R. 23–48; R. 45, 53, 155–156, 193, 385, 435, 454–455, 587, 600, 667, 676–680, 683, 727–728, 742–745, 754, 761–762, 782–783, 790–791, 914–915, 927–934); entered into an agreement with the I. O. E. providing for a closed-shop and check-off of dues (S. R. 32–33; R. 260, 345, 875–877, 826–839, 303–304, 265); coerced employees into authorizing the check-off as a condition to retaining their jobs (S. R. 41, 54–55; R. 76–77, 155–156, 184, 193, 205–206, 828, 843, 855); and pur-

[2] References preceding the semicolons are to the findings of the Board. Succeeding references are to the supporting evidence.

suant to the provisions of the closed-shop contract discharged two employees because they refused to become members of the I. O. E. (S. R. 50–51; R. 172–173, 181, 267–268), thereby engaging in unfair labor practices in violation of Sections 8 (1), (2) and (3) of the Act (S. R. 59). The Board's order required the Company to cease and desist from the unfair labor practices found and from giving effect to its contract with the I. O. E. (S. R. 59–60). In addition the Board's order affirmatively directed the Company to withdraw all recognition from and completely disestablish the I. O. E. as a representative of its employees, to reinstate two of the three employees found to have been discriminated against,[3] to reimburse its employees in the amount of dues checked off their wages on behalf of the I. O. E. and to post appropriate notices (S. R. 59–62).

The Company and the I. O. E. again petitioned the court below to review and set aside the Board's ordered (S. R. 62–63). The court on December 9, 1942, rendered an opinion and entered a decree enforcing the Board's order in full (S. R. 62–79). Judge Soper dissented with respect to enforcement of that portion of the Board's order requiring the Company to reimburse its employees for dues checked off to the I. O. E. (S. R. 76–78).

[3] For reasons fully set forth in its decision (S. R. 57–58) the Board found that it would not effectuate the policies of the Act to order the reinstatement with back pay of one of the employees found to have been illegally discriminated against.

ARGUMENT

1. While, for reasons more fully set out in our brief filed with this Court in an earlier phase of this case (Nos. 25, 26, last Term, pp. 43–49), we believe that the decision below is correct, we agree with the petitioner that the decision, insofar as it enforces the provision of the Board's order requiring the Company to reimburse its employees for dues checked off to the I. O. E., presents an important question which has not been but should be settled by this Court.[4] We, therefore, join with petitioner in requesting that a writ of certiorari issue to review that portion of the decision below which enforced the provision of the Board's order respecting reimbursement for dues checked off.

2. Petitioner also urges review of the question whether there is substantial evidence to support

[4] Other circuit courts of appeals, under varying circumstances, have refused to enforce similar provisions. *Western Union Telegraph Co.* v. *National Labor Relations Board*, 113 F. (2d) 992 (C. C. A. 2); *Corning Glass Works* v. *National Labor Relations Board*, 118 F. (2d) 625 (C. C. A. 2); *National Labor Relations Board* v. *West Kentucky Coal Co.*, 116 F. (2d) 816 (C. C. A. 6); *National Labor Relations Board* v. *United States Truck Co.*, 124 F. (2d) 887 (C. C. A. 6); *National Labor Relations Goard* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984 (C. C. A. 7); *A. E. Staley Manufacturing Co.* v. *National Labor Relations Board*, 117 F. (2d) 868 (C. C. A. 7); *Reliance Manufacturing Co.* v. *National Labor Relations Board*, 125 F. (2d) 311 (C. C. A. 7); *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340 (C. C. A. 8); *National Labor Relations Board* v. *Southwestern Greyhound Lines, Inc.*, 126 F. (2d) 883 (C. C. A. 8); and *National Labor Relations Board* v. *Continental Oil Company*, 121 F. (2d) 120 (C. C. A. 10).

the Board's finding of domination, interference with, and support of the I. O. E. (Pet. 3). Petitioner (Pet. 3, note 4) expressly disclaims presentation of this second question for the purpose of procuring "a reversal of the decree below to the extent that it enforces the disestablishment requirement of the Board's order".

We are uncertain concerning the precise import of the second question thus presented by petitioner; since the reimbursement order, as the Board pointed out (S. R. 55, n. 46), depends upon the particular circumstances of this case, in that sense all the findings are pertinent to a resolution of the first question and petitioner's disclaimer becomes meaningless. Indeed, petitioner fails to specify the breadth of the question which it presents for review, but rather contents itself with the statement (Pet. 3) that the question of adequacy of the evidence should be reviewed only "To the extent, if any, that may be pertinent to a review" of the dues reimbursement question.

In any event, petitioner has not pointed out any respect in which the board's findings are not supported by substantial evidence. As appears from the Statement (*supra,* pp. 3–5), the findings are adequately bottomed upon the evidence. We therefore submit that the sufficiency of the evidence presents no question meriting further review, and that, accordingly, the writ, if granted, be limited to the first question presented.

CONCLUSION

For the foregoing reasons we do not oppose the granting of the petition for a writ of certiorari but suggest that the writ, if it be granted, should be limited to the first question presented in the petition, whether upon the findings, the Board could properly require the dues reimbursement.

CHARLES FAHY,
Solicitor General.

ROBERT B. WATTS,
General Counsel,
National Labor Relations Board.

MARCH, 1943.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*):

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

SEC. 10.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that

any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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